

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOE TONGISH, and DENIS W.)	
TONGISH,)	
)	
Plaintiffs,)	8:06CV365
)	
v.)	
)	
EDWARD SCOTT CARROL, D.O.,)	ORDER
GOOD SAMARITAN HEALTH)	
SYSTEMS, INC., and KEARNEY)	
HEART & LUNG SURGEONS, P.C.,)	
)	
Defendants.)	
)	

This matter is before the court on plaintiffs' appeal, Filing No. 27, of the magistrate's order. Filing No. 23. Plaintiff filed this lawsuit against the defendants alleging negligent surgery and negligent post-operative care. Plaintiff requested a jury trial in Omaha, Nebraska. Defendants each filed a motion requesting the court to change the place of trial to North Platte. Filing Nos. 11, 19 and 20. Plaintiffs responded that Omaha would be a more convenient place for trial but did not offer any evidence or support as required under NECivR 40.1(b). The magistrate reviewed the request and determined that the convenience of the litigants, witnesses and counsel pursuant to NECivR 40.1(b)(2) and 28 U.S.C. § 1404(a) mitigated in favor of trial in North Platte. This court agrees.

The only argument set forth by the plaintiffs before the magistrate was that they would incur greater expense if their expert witness has to testify in North Platte. However, as the magistrate points out, the plaintiffs did not set forth the name of the expert, much less offer any evidence as to the additional expense that might be incurred. The plaintiffs are residents of Kansas. The defendants are located in Kearney, Nebraska, and many of

the witnesses are located in Kearney. Kearney is closer to North Platte than to Omaha. The alleged malpractice occurred in Kearney. Counsel for the defendant is located in Lincoln. The only clear connection to Omaha is that counsel for the plaintiffs resides here. In the statement of appeal, plaintiffs argue, and it is the only argument, that the magistrate failed to consider the convenience of counsel in trying this case. However, although convenience of counsel is a factor, it is not a deciding factor. When all of the circumstances are viewed, the defendants make persuasive arguments as to why this case should be tried in North Platte. The court finds the magistrate is correct in his assessment of this case and accordingly will adopt his report and recommendation.

THEREFORE, IT IS ORDERED that:

1. The appeal of the plaintiffs, Filing No. 27, is overruled; and
2. The report and recommendation of the magistrate, Filing No. 23, is adopted in its entirety. Trial in this case will be conducted in North Platte.

DATED this 4th day of October, 2006.

BY THE COURT:

s/ Joseph F. Bataillon
JOSEPH F. BATAILLON
United States District Judge